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**Site Visits and Audits –
Preparing for the Epilogue**

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By Kathleen Campbell Walker

Determining the best available immigration options and potential consequences for a client (individual or corporate) is challenging enough with the ever-changing barrage of policy and regulatory changes facing attorneys in the field of immigration and nationality law. The approval of a difficult immigrant or nonimmigrant petition filing or visa application, however, does not define the true scope of the analysis. Thus, in trying to figure out the final event or epilogue tied to a benefit filing, that event may be many years hence in the filing of a naturalization application, an application for permanent residence, or a future request for admission to the United States (U.S.). The specter of fraud can remain post the acquisition of U.S. citizenship, so it is of critical importance to document the case file and not take any responses to government forms or petitions lightly from the inception of an immigration petition/application. As immigration counsel, we must implement our own continuous immigration vetting (CIV) protocols just as the Fraud Detection and National Security (FDNS) Directorate of U.S. Citizenship and Immigration Services (USCIS) has established with the U.S. Customs and Border Protection (CBP) National Targeting Center (NTC) and Targeting and Analysis Systems Program Directorate (TASPD)¹.

In immigration matters, the plethora of federal and state agencies and their enforcement mechanisms must be analyzed and prepared for prior to the filing/application with USCIS, the Department of Labor (DOL), or the Department of State (DOS) as well as the application for admission of a foreign national (FN) to the U.S. by CBP. In addition, the Immigrant and Employee Rights (IER) Directorate of the Department of Justice (DOJ) enforcement activities as to preventing discrimination practices must be part of the review as to recruiting practices as well as Form I-9 compliance. Of course, enforcement considerations must also be assessed regarding U.S. Immigration and Customs Enforcement (ICE)/Homeland Security Investigations(HSI).

These agencies and various divisions thereof have numerous Memoranda of Agreement (MOA) or Understanding (MOU), which establish mechanisms and protocols to share information of interest for enforcement purposes. It is a mistake for an immigration attorney to believe that information provided to one agency will not be subject to review by multiple other entities.

In this article, I will focus on best practices in the intake process of new immigration cases to reduce the facilitation or submission of cases, which may exhibit fraud indicators. The impact of a fraud finding can be devastating to a corporate petitioner, individual petitioner, beneficiaries, as well as to their legal counsel.

¹ See Appendix D, Privacy Impact Assessment (PIA) for the Fraud Detection and National Security Data System (FDNS-DS) DHS/USCIS/PIA-013(a) May 18, 2016 and PIA DHS/USCIS/PIA-013-01-(a) (August 30, 2019).

Fraud Consequences

Fraud in immigration benefit applications/petitions typically involves the willful or knowing misrepresentation of material facts for the purpose of obtaining an immigration benefit. Immigration benefit fraud may be facilitated often by document fraud and/or identity theft. Document fraud includes, for example, forging, counterfeiting, altering, or falsely making any document, or using, possessing, obtaining, accepting, or receiving false documents to meet any requirement of or to obtain a benefit under the Immigration and Nationality Act, as amended (INA).² Fraud may result in various statutory violations.³

The consequences of fraud may result, for example, in revocation of a visa⁴; revocation of the approval of a petition for a benefit for good and sufficient cause as of the date of approval of the petition⁵; suspension of processing of any permanent labor certification application involving the employer, attorney, or agent until completion of any investigation and/or judicial proceedings;⁶ debarment of the employer, attorney, or agent from the labor certification program for no more than three years;⁷ fine and/or imprisonment up to five years;⁸ and penalties for fraud and/misuse of immigration documents as well for perjury.⁹

The Administrator of the Wage and Hour Division (W&H) of the DOL is responsible for investigating complaints of violations of the labor condition application (LCA) provisions of the INA in addition to the implementing regulations found at 20 CFR §655, subparts H and I. The Administrator may limit the scope of the investigation to a single worker, a single worksite, or to all worksites of the employer depending upon the nature and scope of the violations alleged or discovered in the course of the investigation. The time period for the investigation is normally two years back from the onset date of the investigation. The LCA is a compliance issue for H-1B, H-1B1 and E-3 nonimmigrants. The potential penalties/enforcement actions authorized under 20 CFR §655.810 include back wages or fringe benefits, civil money penalties (e.g. up to \$8,433 per willful failure as to wages/working conditions), disqualification of the employer from approval of petitions for up to three years, and return of money illegally required to be paid by the employee, reinstatement of workers.

² Pub. L. No. 82-414, § 101, 66 Stat. 163, 167 (1952) (codified as amended at 8 USC § 1101).

³ See e.g., 18 USC ch. 47 (fraud and false statements), in particular §1001 (criminal penalties for false statements and concealment before any U.S. government entity); 18 USC §§1541–1547 (criminal penalties for immigration-related fraud); 18 USC §1621 (criminal penalties for perjury); 8 USC §§1182(a)(6)(C)(i), (a)(6)(F), 1227(a)(1)(A), (a)(1)(B), (a)(3)(C)(i) (grounds of removability for fraud or willful misrepresentations), and §1324c (civil penalties for immigration related document fraud and criminal penalties for not disclosing role as document preparer).

⁴ See 9 FAM 302, 403.11, and 504.1-4.

⁵ INA §205.

⁶ 20 CFR §656.31.

⁷ *Id.*

⁸ 18 USC §§2 and 1001.

⁹ 18 USC §§1546 and 1621.

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